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No. \_\_\_\_\_

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**In the Supreme Court of the  
United States**

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OCTOBER TERM, 1983  
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NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*

*Petitioners,*

vs.

JOHN R. BLOCK, Secretary of  
Agriculture, *et al.*

*Respondents.*

\_\_\_\_\_  
ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF  
COLUMBIA CIRCUIT  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## QUESTIONS PRESENTED

Whether the United States Forest Service burdens religion in a manner cognizable under the First Amendment when it authorizes the operation and expansion of a ski resort at a site sacred to Navajo and Hopi Indians.

Whether Petitioners, Navajo and Hopi Indians, have shown impairment of their religious practices sufficient to trigger an inquiry into the weight of any competing governmental interests.

Whether the First Amendment recognizes only those burdens on religion which prevent practices outright, or whether burdens significantly interfering with the conduct of ceremonies and forcing their alteration are also cognizable.

Whether the First Amendment and Federal laws, including the American Indian Religious Freedom Act, entitle Native American religious interests to substantial weight in federal land management decisions.

#### PARTIES TO THE PROCEEDINGS

Petitioners herein (plaintiffs and appellants below) are the Navajo Medicinemen's Association (Dine Be'azee Iil'iin Yee Ahota), Faye B. Tso, Ashee Begay, Tom Watson, Sr., Miller Nez, Frank Bluehorse, Fred Stevens, Jr., Francis D. Tsosie, Jim Charley, Hoskie Tom Becenti, Tony Trujillo, Jacob Poleviyaoma, Sr., Jacob Poleviyaoma, Jr., Jerry R. Sekayumptewa, and Lavern Siwumptewa.

Respondents are John R. Block, Secretary of Agriculture; R. Max

Peterson, Chief Forester of the United States Forest Service; the United States Forest Service, Department of Agriculture; and the United States of America. The individual defendants were sued in their official capacities only. Northland Recreation, Inc., which intervened as a defendant below, has since divested itself of its permits to operate the ski facility at issue, but retains a financial interest in this proceeding.

This case was consolidated in the Court of Appeals with Nos. 81-1912 and 82-1706, in which the Hopi Tribe was plaintiff-appellant, and Nos. 81-1905 and 82-1725, in which Richard and Jean Wilson were plaintiffs-appellants. Petitions for certiorari have been filed in those cases as well.

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Petitioners, the Navajo Medicine-men's Association and individual practitioners of the Navajo and Hopi religions, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 10, 1983.

OPINIONS IN THE COURTS  
AND AGENCIES BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (App. A) is reported at 708 F.2d 735-760. The District Court for the District of Columbia issued two memorandum opinions, dated June 15, 1981 (App. B) and May 14, 1982 (App. C), respectively. These have not been officially reported, although portions of the earlier opinion have been reprinted in the Indian Law Reporter, Vol.8, p.3073.

The administrative decisions which gave rise to this proceeding have not been reported in any form. These are the initial decision of the Forest Supervisor (App. D), the decision to reverse in part of the Regional Forester (App. E), and the final administrative decision of the Chief of the Forest Service, which reinstated the initial decision (App. F).

#### JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 20, 1983. A timely motion for rehearing and suggestion for rehearing en banc was denied on July 26, 1983 and this petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

U.S. Constitution, First Amendment :

Congress shall make no law  
respecting an establishment of  
religion, or prohibiting the  
free exercise thereof. . . .

American Indian Religious Freedom Act,  
Public Law 95-341, 92 Stat. 469 (1978)  
(codified in part as 42 U.S.C. §1996):

Whereas the freedom of  
religion for all people is an  
inherent right, fundamental to  
the democratic structure of the  
United States and is guaranteed  
by the First Amendment of the  
United States Constitution;

Whereas the United States  
has traditionally rejected the  
concept of government denying  
individuals the right to  
practice their religion and, as  
a result, has benefited from a  
rich variety of religious  
heritages in this country;

Whereas the religious  
practices of the American  
Indian (as well as Native  
Alaskan and Hawaiian) are an  
integral part of their culture,  
tradition and heritage, such  
practices forming the basis of  
Indian identity and value  
systems;

Whereas the traditional American religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;

Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned:  
Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom of worship through ceremonials and traditional rites.

Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

### STATEMENT OF THE CASE

In this action, individual Navajo and Hopi Indians and an association of Navajo medicinemen (spiritual leaders) challenge the decision of the United States Forest Service to permit the operation and expansion of a ski facility on a mountain sacred to members of both tribes. The mountain in question, known as the San Francisco Peaks (or "the Peaks") is located within the Coconino National Forest near Flagstaff, Arizona. The Peaks are indispensable to the practice of the Petitioners' religions. Wilson v. Block, 708 F.2d 735, 744 (D.C. Cir. 1983). The Court of Appeals summarized the significance of the Mountain to these religions:

The Peaks, which rise to a height of 12,633 feet, have for centuries played a central role in the religions of the two tribes. The Navajos believe that the Peaks are one of the four sacred mountains which

mark the boundaries of their homeland. They believe the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin. The Navajos pray directly to the Peaks and regard them as a living deity. The Peaks are invoked in religious ceremonies to heal the Navajo people. The Navajos collect herbs from the Peaks for use in religious ceremonies, and perform ceremonies upon the Peaks. They believe that artificial development of the Peaks would impair the Peaks' healing power.

The Hopis believe that the Creator uses emissaries to assist in communicating with mankind. The emissaries are spiritual beings and are generally referred to by the Hopis as "Kachinas". The Hopis believe that for about six months each year, commencing in late July or early August and extending through mid-winter, the Kachinas reside at the Peaks. During the remaining six months of the year, the Kachinas travel to the Hopi villages and participate in various religious ceremonies and practices. The Hopis believe that the Kachinas' activities on the

on the Peaks create the rain and snow storms that sustain the villages. The Hopis have many shrines on the Peaks and collect herbs, plants, and animals from the Peaks for use in religious ceremonies. The Hopis believe that the use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator.

Id. at 738.

Use of the western shoulder of the Mountain for skiing began with the installation of rustic facilities (a wooden lodge and dirt road) in the 1930's. In the 1950's, the lodge was rebuilt after having been destroyed by fire, and thereafter a poma tow and a single chairlift were installed. From the time that legal services became available to Petitioners in the mid-1960's, plans for expansion of the ski facilities have been the subject of various administrative and judicial challenges by Native Americans, and until

the instant dispute no further development occurred. In 1977, Northland Recreation, Inc. (Intervenor-Defendant below) acquired the Forest Service permit to operate the "Arizona Snow Bowl," and immediately proposed the major expansion which gave rise to this litigation.

The Forest Supervisor of the Coconino National Forest issued a Final Environmental Statement ("FES") which discussed the various alternatives for this site on February 27, 1979. The alternatives ranged from the removal of all facilities (the alternative favored by these Petitioners) to the full expansion proposed by Northland. The Forest Supervisor adopted as the "Preferred Alternative" a plan which would allow for extensive development and exploitation of the permit area. Pursuant to this plan, the character of the western shoulder of the Mountain would be substantially

altered. There had been one chair lift at the Snow Bowl; under the "Preferred Alternative" there would be five, increasing lift carrying capacity by 441%. In addition to the clear-cutting of trees necessary to construct the lifts themselves, many acres of slopes would also be cleared and re-contoured, increasing the slope skiing capacity to 233% of its previous level. A lodge facility which could accommodate over 900 people would also be constructed. The dirt road giving access to the Snow Bowl would be paved and widened and an eight-acre parking area provided.

Petitioners filed a timely appeal of the Forest Supervisor's decision with the Regional Forester of the United States Forest Service. On review, the Regional Forester reversed the decision to expand the facilities, holding that the Snow Bowl should continue to

operate at its existing level of development. That decision was reversed on further appeal to the Chief Forester of the United States Forest Service. The Secretary of Agriculture thereafter declined to exercise his discretion to review this matter and the administrative proceedings were completed.

This suit was then filed in the United States District Court for the District of Columbia. Jurisdiction was based upon 28 U.S.C. §§ 1331, 1343, 1361, 2201, 2202; 5 U.S.C. §702; and 16 U.S.C. §1540. The complaint alleged inter alia that the decision of the Forest Service to proceed with development violated the Free Exercise Clause, the American Indian Religious Freedom Act, the fiduciary duty of the United States to Native Americans, and the Administrative Procedure Act. Petitioners sought an injunction against further development of the Snow Bowl and

the termination of the existing use permits.

The Federal defendants stipulated to material facts including that Petitioners' religious beliefs are sincere, that they use the whole of the Mountain for religious purposes, and that the entire Mountain including the Snow Bowl area is regarded as sacred. Joint Appendix in the Court of Appeals ("Jt. App.") at 181-183. Petitioners submitted numerous affidavits detailing their religious use of the Peaks, the interference caused to date by the existing Snow Bowl facilities, and the exacerbation that would inevitably result from the planned expansion.

The District Court denied the relief sought by the Petitioners and the Court of Appeals affirmed. See App. A and B. The Court of Appeals held that Petitioners had not shown a burden

cognizable under the First Amendment because they had not proven "that expansion of the ski area will prevent them from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else." 708 F. 2d at 744. The Court also rejected Petitioners' claim that the Forest Service had violated the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. §1996, and affirmed without discussion the District Court's conclusion that the manner in which the various Forest Service officials weighed the factors supporting and opposing development was not a violation of the Administrative Procedure Act. Petitioners seek review of this decision and a determination by this Court as to the extent of protection the Constitution and laws of the the United States afford their religious exercise.

## REASONS FOR GRANTING THE WRIT

A. THE EXTENT OF PROTECTION AFFORDED BY THE CONSTITUTION AND FEDERAL LAW TO NATIVE AMERICAN RELIGIOUS USE OF FEDERAL LANDS IS A CRITICAL QUESTION NOT YET RULED ON BY THIS COURT.

There has been a belated but growing recognition on the part of the Federal Government that Native American religions, with tenets and practices often foreign to mainstream faiths, have been overlooked in this Nation's commitment to religious freedom. To Native American religious practitioners like Petitioners, certain sites, such as the San Francisco Peaks, are imbued with great religious significance, have a prominent role in ritual and ceremony, and are regarded as sacred beings in themselves. In most cases the religious practices associated with these sacred places long predate the coming of the white man. Conflicts arise when federal

officials, who are the present-day stewards of such shrines, seek to alter their natural condition. To the religious practioners, this is a desecration, and may severely impair their religious ceremonies. That federal land managers have often been insensitive to such concerns was a principal reason for the enactment of the American Indian Religious Freedom Act, 42 U.S.C. §1996.

Also in recent years, Native Americans have for the first time been able to seek the protection of the courts for their religious practices associated with federal land. Although virtually unknown to the federal courts previously, these cases have been arising with increasing frequency. Petitioners are aware of at least seven such cases brought since 1977. This Court has yet to rule in such a case.

In the absence of direction from

this Court, the lower federal courts have had considerable difficulty in arriving at a consistent and appropriate analytical approach. Most of them, like the Court of Appeals herein, have proceeded from the questionable assumption that the standards used in other First Amendment decisions of this Court are not applicable. In addition, as will be further discussed below, the standards substituted by these courts differ one from another, and are in direct conflict in several important respects.

One need cite no authority for the importance of the free exercise of religion in our pluralistic society. It is therefore essential that federal land managers nationwide be given appropriate guidance on the consideration due Native American sacred sites. If Petitioners' claim is indeed not governed by the First Amendment law written by this Court to

date, then it is critical that the new principles to be applied are established by this Court as the Nation's highest Constitutional authority. If, on the other hand, as Petitioners have argued, the principles previously stated by this Court are applicable, then it is of vital importance to Native Americans that this Court so instruct the lower courts.

B. THE RULING OF THE COURT OF APPEALS IS INCONSISTENT WITH FIRST AMENDMENT PRINCIPLES PREVIOUSLY ENUNCIATED BY THIS COURT.

The holding of the Court of Appeals is that unless government prevents religious practice, it does not burden religious practice. Wilson v. Block, at 745. Thus if governmental action destroys one part of a religious shrine, but does not prevent the religious practice associated with that site from occurring elsewhere, then it does not "burden" religious practice in a

manner cognizable under the Free Exercise Clause. Wilson v. Block, at 744, 745. "Petitioners seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site." Id. at 744.

Hence the Court considered the critical factual question in the case to be whether the Snow Bowl portion of the Peaks was "indispensable" to the practice of Petitioners' religion; or, in other words, whether there were practices which could be carried out only at that place on the sacred mountain. The Court even relied on the fact that Petitioners have "managed to coexist" with existing development on the Peaks, implying that only by abandoning their religious practices altogether could they prove

that their use of a particular religious site was subject to a constitutionally cognizable burden. Id. at 745. This analysis of what constitutes a burden on free exercise is unprecedented outside of the few Indian religion cases and fundamentally at odds with the prior decisions of this Court.

It simply cannot be contended that the loss of a significant portion of their most important shrine does not interfere with Petitioners' religious practices and beliefs. As the Court of Appeals itself acknowledged, for the Petitioners it is the Mountain as a whole that is sacred, and not merely a particular part. Traditionally, all of the Mountain is used for religious practices, and certain ceremonies involve travelling to all sides. E.g. Jt.App. at 811. Religious pilgrimages to shrines in other areas pass through the Snow Bowl portion

of the mountain. Various sacred plants and herbs needed in religious ceremonies can only be gathered in the Snow Bowl area.<sup>1</sup> The practitioners cannot abandon

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<sup>1</sup> Petitioners' argument with the Court of Appeals is essentially legal rather than factual. That court's extremely narrow definition of burden excluded from consideration a whole range of impairments on religion the existence of which were not as a factual matter disputed. But in at least two particular respects -- in connection with a Hopi pilgrimage route and Navajo collection of sacred herbs -- Petitioners did show the impairment, and threatened extinction, of practices which could only be carried out in the Snow Bowl area. They thus met the Court of Appeals' test, and submit that the failure to grant them relief was erroneous on that basis as well.

The District Court had decided the religious issues following cross-motions for summary judgment. There was neither discovery nor an evidentiary hearing. No findings of fact as such were made. The proceedings were held by the Court of Appeals to have been a trial on the written record.

Petitioners' affidavits showed that there is a Hopi pilgrimage route passing through the permit area whose use is disrupted by Snow Bowl operations, and that Navajo practitioners had been interfered with in collecting certain herbs which could only be collected there. *Jt. App.* 787-788, 811, 816. The Court of Appeals

[Cont'd on following page]

their religious use of one side without significantly altering both their practices and beliefs. As the record indicates, they have been forced to forego certain practices that were formerly conducted in this area. Jt.App. at 819,

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in its opinion did not acknowledge these two facts. However, even treating the proceedings in the District Court as a trial, they were never effectively controverted. On the question of religious infringement, the Government submitted only two affidavits of non-Indian anthropologists. One was entirely conclusory and contained no discussion of specific practices. Jt.App. at 911-913. The other stated that to the best of the affiant's knowledge, the permit area did not involve any areas used for the Hopis' "final approach to the summit." Jt.App. at 909. It did not otherwise deny the existence of a pilgrimage route in the Snow Bowl. The same affiant stated as to the Navajos that whereas sixty-four discrete Navajo ceremonies had been identified, in terms of "actual, physical use" of the Peaks, his knowledge was limited to a single ceremony. "I cannot speak of matters pertaining to other ceremonies." Jt.App. at 904, 908. The affiant's assertion that "[n]o ceremonial items . . . are found only in the permit area," *Id.*, must be understood in this extremely limited context, and the Court of Appeals' reliance on that statement as applying to Navajo religion generally, 708 F.2d at 744, was clearly erroneous.

842, 861. The proposed development will exacerbate this interference.

Nor is it the case that the impact of the recreation facility is confined to the permit area. The ski lift is operated during the summer months as a tourist attraction. Many more people would be attracted by the paving of the road and other construction planned. As is admitted in the EIS, the noise, dust, and visual effects are far-reaching. The impact of tourists and recreationists attracted by this facility are felt throughout the Peaks. Religious shrines in other areas have been disturbed and the natural status of adjacent areas is altered. The commercial development and activities fostered by the Forest Service make it impossible for Petitioners to maintain a proper religious atmosphere while at the shrine. These effects, both direct and indirect,

constitute a burden on religious exercise.

The Free Exercise Clause of the First Amendment, as interpreted by this Court, provides substantial protection for conduct grounded in religious belief. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205, 220 (1970); Sherbert v. Verner, 374 U.S. 398 (1963). This Court has never required the outright prevention of religious practices as a minimum for First Amendment protection. In fact, it has held the Free Exercise Clause to prohibit even indirect burdens. In Sherbert v. Verner, 374 U.S. 398 (1963), this Court held that:

[I]f the purpose or the effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is invalid even though the burden may be characterized as being only indirect.

374 U.S. at 403-404, citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961). Accord, Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981). See also, Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). Similarly, speaking of the First Amendment generally, this Court has said:

First Amendment decisions have consistently held in a wide variety of contexts that the compelling-state-interest test is applicable not only to outright denials but also to restraints that make exercise of those rights more difficult.

Maher v. Roe, 432 U.S. 464, 487 (1977).

Most recently, in Bob Jones University v. United States, \_\_\_ U.S. \_\_\_, 76 L.Ed.2d 157, 180-181 (1983), this Court again applied the compelling-state-interest test in a case in which the burden at issue did "not prevent [the plaintiffs] from observing their religious tenets." These Petitioners contend

that the burdens involved in Sherbert, Thomas, and Bob Jones (namely, the denial of unemployment benefits and tax exemptions) are both less severe and less direct than those resulting from the destruction of a sacred area and the cessation of the ceremonies performed there. In response, the Court of Appeals merely suggests that these prior decisions create no "benchmark against which to test all indirect burden claims." Wilson v. Block, at 743. Petitioners cannot agree that these decisions are without application to this case. They do not accept that the First Amendment recognizes the indirect burdens at issue in those cases but is blind to the host of direct religious impairments shown in this case.

The government may justify a limitation on religious liberty by showing that it is essential to

accomplish an overriding governmental interest. United States v. Lee, 455 U.S. 252, 257-258 (1982); Bob Jones University v. United States, \_\_\_ U.S. \_\_\_, 76 L.Ed.2d 157 (1983). But if the governmental interest is not compelling, then the burden is impermissible. Petitioners seek only to have this basic First Amendment principle applied to their religion, as it is to others. Where the competing interest is on the order of commercial down-hill skiing, then Petitioners, and those like them, are entitled to protection. The balancing requirement cannot be avoided through the device of creating a restrictive and unreasonable definition of "burden" with application only to this particular type of religion.

C. RECENT DECISIONS OF THE LOWER COURTS, INCLUDING THE SIXTH, EIGHTH, AND TENTH CIRCUIT COURTS OF APPEALS, ARE IN CONFLICT.

As practitioners of Indian religions continue to seek protection for their beliefs and practices, the conflict and confusion among the Circuits is becoming more apparent. Despite the factual distinctions that exist in these cases, the inconsistent legal analysis that is being applied to Indian religious claims cannot be overlooked. Opinions from the Sixth, Eighth, Tenth, and District of Columbia Circuits are in conflict with prior opinions of this Court and with each other. They focus on disparate issues, apply different tests, and adopt unique legal standards. It is crucial that this Court bring some coherence to this area of constitutional law.

The Sixth Circuit focused its

attention upon the nature of the religious beliefs and practices which would be affected by Federal action. Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980). That Court held that to warrant protection, "worship at the particular geographic location" must be "inseparable from a way of life", "the cornerstone of religious observance," or "play a central role in religious ceremonies." Id. at 1164. There is no basis for a secular court to assume the responsibility of making such theological determinations. The cases from which these standards were purportedly derived, such as Wisconsin v. Yoder, 406 U.S. 205 (1972), simply do not impose such legal requirements as a minimum for First Amendment protection. Moreover, this Court has frequently noted that it is not a court's function to be an arbiter of what is or is not of significance to a

particular faith. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 716 (1981); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). And despite the assertion by the District of Columbia Circuit that it relied upon the Sequoyah analysis, it specifically rejected the "centrality" analysis adopted in that case. Wilson v. Block, at 743.

The first two Federal District Courts considering claims like this took a different approach. They focused on the government's property interest, concluding that the Free Exercise Clause could never supersede the government's rights as landowner. Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E.D. Tenn. 1979). In both instances the Courts of

Appeals rejected this analysis on the basis that, "[t]he government must manage its property in a manner that does not offend the Constitution." Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980) citing Sequoyah, 620 F.2d at 1164.

However, the District of Columbia Circuit in this case has again resorted to federal land ownership as the basis for the unique definition of "burden" it created. Nothing but the Federal interest in its land is suggested as the rationale for the "indispensability" standard. The District of Columbia opinion also distinguishes the only relevant non-Indian decision on the basis of land ownership. It was held in Pillar of Fire v. Denver Urban Renewal Authority, 181 Colo. 411, 509 P.2d 1250 (1973), that members of a church threatened with destruction as part of an urban renewal project were entitled to a

court hearing at which their interests could be weighed against those of the renewal authority. "[R]eligious faith and tradition," said the court, "can invest certain structures and land sites with significance which deserves First Amendment protection." 181 Colo. at 419, 509 P.2d at 1254. The Court of Appeals herein held that its opinion did not conflict with Pillar of Fire because "a governmental taking of privately-owned religious property . . . involves different considerations than does a claimed First Amendment right to restrict the government's use of its own land." Wilson v. Block at 742, n.3. The Court did not elaborate on these different considerations, nor explain how a difference in land ownership could result in similar burdens being "cognizable" in one case but invisible to the First Amendment in the other.

Another recurring question in these cases is whether the Establishment Clause bars government from taking actions necessary to accommodate Native American religious use of land. In Badoni, the Tenth Circuit denied the plaintiffs' claims for relief on that basis. Badoni v. Higginson at 179. See also Crow v. Gullet, 541 F.Supp. 785, 791-792, 794, (D.S.D. 1982), aff'd on basis of District Court opinion, 706 F.2d 859 (8th Cir. 1983). The protests of these courts against the existence of "government-managed religious shrines" ignores the fact that these sites were religious shrines long before the government assumed control over them. Badoni, 638 F.2d at 179; Crow, 541 F. Supp. at 792.

In the instant case as well, the ruling of the District Court was that the Establishment Clause would

prevent the United States from granting Petitioners' plea for religious accommodation. App. B. That aspect of its analysis was adopted by the Crow District Court, in the opinion later relied on by the Sixth Circuit, supra. By contrast, the Court of Appeals herein did not rely on any Establishment Clause analysis. It in fact noted its agreement with Petitioners' position that "where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief." Wilson v. Block, at 747. This is inconsistent with the analysis of the other courts aforementioned, which appear to have relied on the possibility of an Establishment Clause violation as a basis for determining that there was no burden cognizable under the Free Exercise Clause.

Most recently, in Northwest Indian Cemetery Protective Association v.

Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), appeal pending (9th Cir. No. 83-2225), the lack of consensus among the courts culminated in a result in clear conflict with the instant case. Four days after the Court of Appeals ruled herein, the California District Court permanently enjoined the Forest Service from developing the sacred "high country" of certain Indian tribes. The difference in result between that case and this one is attributable to an entirely different approach to the crucial question of what kind of burden on religion is cognizable under the First Amendment. The California court recognized that there as here, "the area considered sacred encompasses an entire region rather than simply a group of individual sites." Id. at 591. The Court rejected a Forest Service proposal to establish half-mile radius "protective zones" around the

sites of the "prayer seats" used by Native Americans, and to screen off a pilgrimage route by strips of unlogged land. The opinion indicates that "these protective zones would fail significantly to mitigate the adverse visual, aural, and environmental impacts of logging activities on the high country's salient religious characteristics." Id. at 592.<sup>2</sup> Consequently, that Court concluded that the proposed development, even if it made allowance for protecting those areas which involved practices that could not

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<sup>2</sup> The court in Northwest Indian Cemetery noted that because many religious sites were located at high elevations, it was impossible to mitigate the visual impact of logging the valleys between the Peaks. This is to be contrasted with the suggestion of the Court of Appeals herein that the impact of developing 777 acres within the much larger area defined by the Forest Service as the "San Francisco Peaks Land Management Area" could not be significant. The Court failed to take into account that the acreage at issue is near the top of the Mountain, and the impact of its development correspondingly great.

be performed elsewhere, constituted a cognizable burden on free exercise.

Under the test adopted by the Court of Appeals herein, however, the outcome in the California case would necessarily have been different. Just as the Court here inquired only whether there were practices that could be carried out solely in the ski area, the court there would have had to limit its inquiry to whether there were practices which could be performed only in the path of the planned road or at the specific sites slated for logging. "Visual, aural, and environmental" impacts on other locations would be ignored. And by definition, a plan to leave untouched the actual sites used in the religious ceremonies would have left no burden on the basis of which relief could be granted.

There are obvious conflicts

between the decision herein and those from other Circuits. This case presents an appropriate means to resolve them. More than any of the other cases discussed above, the decision herein on the First Amendment issue turns squarely on the question of what constitutes a cognizable burden on Free Exercise. The interests at stake are undeniably religious and no compelling justification has been suggested. It is important that these issues be resolved by this Court, both for the sake of Petitioners' religions and for the sake of the uniform and proper disposition of the cases yet to come.

D. THE COURTS AND FEDERAL OFFICIALS  
NEED GUIDANCE IN WEIGHING INDIAN  
RELIGIOUS INTERESTS IN LAND MANAGEMENT  
DECISIONS.

This case points out an additional need for guidance from this

Court. The San Francisco Peaks are just one of the many religious shrines managed by the United States. For instance, the National Park Service alone is responsible for at least 121 churches and other religious properties on Federal lands. (This does not include the vast majority of Indian religious sites located on all types of Federal land.) The Federal land managers are treating various religious interests in an inconsistent manner.

This Court has recently noted that religious interests are "without question . . . entitled to substantial weight" in certain land use decisions made by government. Larkin v. Grendel's Den, \_\_\_\_ U.S. \_\_\_\_, 74 L.Ed.2d 297, 305-306 (1982). It is clear that certain mainstream religions do receive such consideration from Federal officials. Note, for example, the preferential treatment the Holy City Christians have

received for use of the Wichita Mountain Wildlife Refuge, Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981). On those Federal lands, Christians are allowed to maintain a replica of Jerusalem and a monument of Christ. By way of contrast, in the land use planning associated with the San Francisco Peaks, Indian religious interests received very little real consideration. In the matrix by which certain numerical values were assigned to the various interests involved, the religious interests of the Petitioners were assigned precisely the same value as were human waste disposal considerations, dust control, and summer sightseeing. Jt.App. at 1883 et seq. By the Forest Service's computations, Indian religion was assigned a value less than one tenth of the positive value assigned to recreation. Id. By comparison decision-makers are unlikely even to

consider actions which would significantly offend more dominant religious interests. The American Indian Religious Freedom Act, 42 U.S.C. §1996, makes it clear that Congress intends for Federal officials to make themselves aware of and responsive to Indian religions as well. However, the recent Indian cases discussed above make it clear that this obligation is not being met.

Petitioners contend that the failure of Federal officials to give proper weight to the religious significance of the Peaks in the decision-making process constitutes a violation of the Administrative Procedures Act, 5 U.S.C. §701. Even if the First Amendment does not compel a particular result, a decision that equates religious interests with dirt and waste must be regarded as arbitrary and an abuse of discretion. This is particularly so in light of AIRFA

and the Federal trust responsibility to Native Americans, which includes the duty to preserve Indian cultures. Peyote Way Church of God v. Smith, 556 F.Supp. 632, 639 (N.D. Texas 1983). Furthermore, the failure of Federal officials to give Indian religions the same consideration which more mainstream religions have received raises serious Equal Protection and Establishment Clause issues. This Court could lay these issues to rest by providing guidance as to how religious interests should properly be weighed in land management decisions.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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